

SUMMARY OF COMMENTS BY GEORGE FORMAN AT FEBRUARY 9, 2010
SENATE G.O. COMMITTEE INFORMATIONAL HEARING ON INTERNET POKER

Although some have claimed that legislative authorization of intrastate on-line poker would "violate tribal exclusivity" under various tribal-state Class III gaming compacts currently in effect, none of those claims have been legally or factually substantiated; rather, the claim boils down to the assertion that authorizing the use of a computer to place wagers on or participate in a poker game would constitute authorization of the use of "gaming devices" as defined in existing Class III gaming compacts, and thus would entitle tribes to stop making payments to the State under those compacts. This assertion lacks merit for the following reasons:

1. No Tribal-State Compact now in effect grants tribes an exclusive right to operate poker games; rather, poker is a permitted game under California law, and the Legislature may prescribe how it may and may not be played, including on-line. Under California law, poker may be played only as a round game, and not as a banking or percentage game. Therefore, under the Indian Gaming Regulatory Act, if played within Indian country, poker is a Class II game that tribes may conduct without having to enter into compacts with the State for that purpose.

2. Article IV, § 19(f) of the California Constitution authorizes the operation of slot machines and banked and percentage card games only on Indian lands, and only if operated pursuant to tribal-state Class III compacts that are in effect. As a Class II game under IGRA, poker would not be subject to compacting.

3. Existing Class III compacts all define a "Gaming Device" as a slot machine, in various iterations, and all of the additional descriptions in the Compact relate back to a slot machine. This includes "facsimiles of games of chance or skill", which differ from the actual games of chance or skill in that the machine must contain all elements of the game; equipment that merely enables players to play against each other is not a facsimile. A slot machine is, by definition, a house-banked game, and in return for insertion of money or some other representative of value, applies an element of chance to determine the game outcome and whether the player is entitled to receive a prize.

In on-line poker, there is no house-banked or percentage game, and no gaming device that either applies the element of chance that determines game outcomes or wins or loses for the house. The only functions the website computer performs are to shuffle/deal a virtual deck of cards (once dealt, cards may not be re-dealt during the hand), deal the cards, track players' wagers and take a collection (in California, the collection consists of a fixed fee either per hand or per unit of time; the house cannot "rake" the pot as in other jurisdictions or existing poker websites, because that would constitute a percentage game that would violate both Penal Code § 330 and Art. IV, § 19(e) of the State Constitution). Game participants play with and/or against each other, not with or against a machine; their computers don't apply any element of chance, determine game outcomes or award prizes. In an opinion dated April 11, 2008 addressed

to Assembly Member Lloyd Levine, the office of Legislative Counsel reached the same conclusion.

3. If a court were to render a final and unappealable judgment that on-line poker constitutes a "Gaming Device" within the meaning of any compact currently in effect, it would have to be because the court found that individual players' computers, the Internet, the website's computer(s) or some combination thereof constitute(s) a slot machine. Slot machines and banked and percentage card games are core components of casinos of the type currently operating in Nevada and New Jersey (among other places). Article IV, § 19(e) of California's Constitution forbids the Legislature (as well as the People, through an initiative) from authorizing, and mandates the Legislature to prohibit, casinos of the type currently operating in Nevada and New Jersey. The California Supreme Court, in *H.E.R.E v. Davis* (1999) 1 Cal.4th 585, held that the Penal Code's prohibitions against slot machines and banked and percentage card games were incorporated into the Constitution in 1984. Therefore, the Legislature would have no power to enact any law that would authorize slot machines, any such law would be struck down by the courts and the tribes' exclusive right to operate slot machines would not be abrogated.